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1. SD Myers arbitral award set for judicial review in Canadian Court,
By Luke Eric Peterson

Later this autumn, a Canadian Federal Court will hear arguments in a judicial review of the tribunal decision in the NAFTA Chapter 11 case of SD Myers v. Canada.

The review promises to be an important one, as it could clarify further the extent to which domestic courts can exercise oversight over decisions rendered by arbitral tribunals in NAFTA investment disputes.

In its written pleadings in the case, the Canadian Government argues that the tribunal overstepped its authority when it held Canada liable for violations of the NAFTA's provisions on National Treatment and Minimum Standards of Treatment.

The judicial review of the Myers award will hinge upon the Court's interpretation of the Canadian Arbitration Act, which permits domestic courts to set aside arbitral awards when an award deals with matters "beyond the scope of the submission to arbitration" or "is in conflict with the public policy of Canada"

The parties to the case differ over the degree of deference to be accorded to arbitral awards by reviewing courts.

For its part, Canada acknowledges that decisions of arbitral tribunals are traditionally accorded a high degree of deference by reviewing courts, but lawyers for Canada insist that the decisions of NAFTA arbitration tribunals are entitled to less deference than run-of-the-mill commercial arbitrations.

In its written arguments in the case, Canada suggests that NAFTA Chapter 11 arbitrations "have important public policy implications that impact upon, and are of interest to Canadians generally and non-disputing NAFTA parties."

Accordingly, it would hold arbitrators to a standard of "correctness" whereby any errors in stating and applying the appropriate law, would be grounds for a domestic court to set aside the award.

Meanwhile, counsel for the investor argues that domestic courts must approach arbitral awards - even those in NAFTA disputes - with a "powerful presumption" that the tribunal has acted within its powers. Only where the tribunal's reasoning appears to have been patently unreasonable - or at the least simply unreasonable - would a court be justified in setting aside an award.

The standard of review adopted by the Court will be critical, as it will determine whether it can set aside several of the tribunal's key rulings in the case, including ones which found that SD Myers Canada was an investor under the terms of the NAFTA Chapter 11 (and as such eligible for investor-state arbitration); the "like circumstances" test employed by the tribunal to determine that SD Myers Canada's sales office was in like circumstances to domestic players in the hazardous waste remediation business; and a determination that the NAFTA's provision for minimum standards of treatment had been violated by Canada.

Notwithstanding the wrangle over the appropriate level of deference due to the tribunal's ruling, it should be noted that not all investment treaty disputes can end up in a domestic court.

In the Myers case, Canada was able to take its claim to the Canadian courts because the original arbitration operated under the UNCITRAL rules, which do contemplate some form of review of awards by domestic courts (typically guided by domestic arbitration legislation). Conversely, however, arbitrations which take place under the rules of the International Center for Settlement of Investment Disputes (ICSID) are eligible only for review through ICSID's internal processes, such as ICSID's process for annulment or rectification of an award.

The ICSID does offer a second form of arbitration under its so-called Additional Facility rules - typically where, either the home or host government is not a party to the ICSID Convention - and these Additional Facility arbitrations are not insulated from domestic review.

Because two of the three NAFTA parties (Canada and Mexico) are not among the more than 140 countries which have acceded to the ICSID Convention, it is common for NAFTA arbitrations to take place under either the UNCITRAL or Additional Facility rules, thereby making them subject to the oversight of domestic court systems.

The judicial review of the SD Myers award is expected to be open to the public, and will take place beginning Dec 1 in Ottawa, Ontario at 9:30AM. The hearing is expected to take up to three and a half days. For more information see the Court's website address below.

Sources:

Legal arguments in the case are available at:
www.dfait-maeci.gc.ca/tna-nac/disp/SDM-review_archive-en.asp

Canadian Federal Court (Trial Division), list of hearings:
www.fct-cf.gc.ca/business/hearings/t_full_e.shtml

2. UK investor fails in BIT claim against Czech Republic,
By Luke Eric Peterson

A UK investor has failed in his efforts to claim damages under a bilateral investment treaty against the Czech Republic for having been the victim of an alleged expropriation and discriminatory treatment.

In 2002, British businessman William Nagel mounted a claim at the Stockholm Arbitration Institute, alleging that the Czech authorities had backtracked on a commitment to award him a GSM mobile phone license.

The Czech authorities went on to hold a public tender for two mobile phone contracts, neither of which was awarded to Mr. Nagel.

Czech media report that the claim was dismissed and that the tribunal held Nagel liable for 90% of the costs of that arbitration.

According to sources familiar with the dispute, Mr. Nagel's arbitration was dismissed by the tribunal on the grounds that his earlier agreement with a Czech state enterprise did not constitute an "investment" under the terms of the UK-Czech bilateral investment treaty. As such the award does not go into a close analysis of the treaty provisions on expropriation, faire & equitable treatment and non-discrimination.

The tribunal's decision has been hailed by Czech officials, who are facing a string of investment treaty arbitrations in the wake of a successful multi-million dollar claim by CME, a European-based broadcasting firm, earlier this year.

A spokeswoman for the Czech finance ministry told one Prague-based business publication that the Stockholm award confirms that the Czech Republic is not an "easy mark for arbitration".

At press time, INVEST-SD News Bulletin was seeking to obtain a copy of the award. This request is currently being considered. If this effort proves successful, notification will follow in a subsequent issue of the Bulletin.

Ordinarily, awards arbitrated under the Stockholm Institute's rules are not published, making it difficult to assess the volume and subject

matter of BIT claims handled through this avenue.

3. Argentine Congress to allow utility rate hikes; impact on arbitrations unclear,
By Luke Eric Peterson

Following a demand from the International Monetary Fund (IMF), the Argentine Congress has voted to allow the Executive branch to raise the rates charged by privatized utilities. The rates have been frozen since January 2002, when the Government imposed emergency measures in the face of an economic crisis.

Armed with the ability to raise tariffs - a key demand of dozens of foreign investors in sectors such as water, energy, and telecommunications - the Government will also pursue renegotiation of utility contracts over the longer term. However, with 57% of Argentines below the poverty line, the Government has made clear that there are limits to its flexibility.

Recently, Economy Minister Roberto Lavagna told Latin Trade Magazine: "Unfortunately, there are still people who haven't realized the paradigm has shifted. A rate hike is legitimate for companies to expect. But our economic agenda consists of more important things than satisfying narrow sector interests."

For their part, many foreign investors have already resorted to international arbitration under the terms of bilateral investment treaties signed between their home governments and Argentina. Several billion dollars worth of claims have been reported to have been lodged with the Washington-based International Center for Settlement of Investment Disputes (ICSID).

If utilities are permitted to increase their rates, this would help to staunch the losses which have mounted for many foreign firms with outstanding debts in US dollars. Although many utility contracts negotiated with the Argentine Government stipulated that local tariffs would be collected in US dollars, such provisions were overridden by the Government's emergency laws. After January of 2002, utilities watched their debts mount as they collected revenues in depreciated Pesos.

With the possibility that the Government may now allow tariff rates to rise - which could improve the profitability of foreign investments - it remains unclear how such a move would affect the prospects of investor arbitration claims which seek to construe the Government's earlier moves (including the forced Pesofication of tariffs) as a form of "expropriation".

An earlier arbitration under the North American Free Trade Agreement, *SD Myers v. Canada*, saw a Tribunal reject an expropriation claim where the government measure challenged had been a temporary, rather than a permanent, measure.

4. Oil, gas and energy law intelligence service launched

A bi-monthly intelligence service on oil, gas and energy law has been launched this year by Prof. Thomas Walde, an expert on natural resources law and investment arbitration at Dundee University in Scotland.

In addition to its bi-monthly newsletter, the OGEL service also offers access to an extensive database of 'primary legal/regulatory' materials and articles by expert commentators,

For full information about the service see:

www.gasandoil.com/ogel

INVEST-SD Bulletin is edited in Boston, Massachusetts, by Luke Eric Peterson for IISD. Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

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